CONSTITUTIONAL PROVISIONS

In addition to the relevant provisions in the Warden's Petition, this case also implicates the Eighth Amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted.

REASONS FOR DENYING THE WRIT

Respondent Edward Schad[1] respectfully requests this Court deny the petition for writ of certiorari. No certiorari-worthy reason exists for this Court to review the Ninth Circuit Court of Appeals majority opinion ordering a limited remand to the district court to determine the reasonableness of Schad's efforts during state postconviction proceedings to discover all the facts supporting a life sentence. The limited remand is appropriate for two reasons. First, the district court below denied Schad an evidentiary hearing on sentencing counsel's ineffectiveness based on an erroneous belief that Schad's lack of success in discovering all the mitigating evidence during the state postconviction proceedings demonstrated a lack of diligence on Schad's part. The district court failed to consider the reasonableness of counsel's efforts to develop the facts in state court as required by this Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000) in light of the fact that the state court failed to timely provide needed funds and experts to develop the facts in state court and then only denied an evidentiary hearing because

---

[1] Edward Schad is one of the few Arizona inmates who was sentenced under Arizona's unconstitutional judge sentencing statute. *Ring v. Arizona*, 536 U.S. 584 (2002). Schad's case was stayed in the district court for a number of years pending this Court's decision on the retroactivity of *Ring*. *See Schriro v. Summerlin*, 542 U.S. 348 (2004). Even though Mr. Schad had consistently challenged the constitutionality of judge sentencing, even before this Court's decision in *Walton v. Arizona*, 497 US. 639 (1990)(which was reversed by *Ring*) Mr. Schad was denied resentencing on this claim because of the non-retroactivity of *Ring*.

counsel had failed to establish a causal nexus between the evidence counsel sought to develop and the crime for which Mr. Schad was sentenced to death. Cert.Pet.App. A-44. As the court below recognized, and consistent with this Court's longstanding law, a State's success in arguing against an evidentiary hearing in state postconviction proceedings does not determine the separate issue of the capital defendant's diligence in investigating and presenting evidence discovered during those proceedings supporting a claim of trial counsel's ineffectiveness. *Id.*, A-43; *Williams v. Taylor*, 529 U.S. 420, 432, 435 (2000)(prisoner diligent if he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue the claims in state court"). Instead, diligence "require[s] in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Second, assessing a defendant's diligence is an objective inquiry, requiring the court to determine whether a petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* Diligence requires petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. Schad satisfied that requirement. He alleged a colorable claim of trial counsel's ineffectiveness at Schad's life or death sentencing trial. He requested the state postconviction court grant him a hearing where he could present evidence. He also attached affidavits supporting his request for a hearing and relief. ER 292-295, 301-310, 322-327, 328-337. That is what Arizona law required, and that is just what Schad did. *State v. Watton*, 793 P.2d 80, (Ariz. 1990).

But when a federal court raises a question as to a defendant's diligence in discovering evidence, as the court of appeals below did here, a brief remand to the district court to allow that

court to undertake an inquiry in Schad's diligence, and if needed, consider additional evidence before making that determination, is not surprising or unusual. Many fact-bound determinations require additional evidence be heard to determine the merit of asserted procedural defenses. *See e.g. Roy v. Lambert*, 465 F.3d 964 (9th Cir. 2006)(hearing on facts regarding equitable tolling). That, too, is not a startling proposition, but a reasonable one, as the law had long recognized:

> Indeed, sometimes the determination whether to hold a federal evidentiary hearing on the merits of the petition requires a preliminary hearing to assess whether the petitioner is entitled to a hearing on the merits.

Federal Habeas Corpus Practice and Procedure, Randy Hertz and James Liebman ("Hertz & Liebman"), p. 500 (5th ed. 2001), Sec. 20.1(c), p. 900, n. 44, citing *Wright v. Gramley*, 125 F.3d 1038, 143-45 (7th Cir. 1997) (remanding to allow petitioner to explain failure to develop facts in state court and "convince the district court that his failure to present the facts in plenary fashion to the state court was not due to his own neglect."). "The need for evidentiary hearings extends not only to the factual issues presented by the petitioner's claims but also to those presented by the many prerequisites and exceptions to the state's procedural defenses." Hertz & Liebman, *supra*, p. 896. "[E]ither party may request a hearing on either its own or the opposing party's claims and defenses." *Id.*, n.35.

Remand of the proceedings to allow the district court to apply the proper standard in determining Schad's diligence does not conflict with *Williams, supra, Schriro v. Landrigan*, 550 U.S. 465 (2007), or 28 U.S.C. section 2254 (e) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Cert.Pet., pp. 14-15. It is consistent with both, and the Warden's[2] contrary argument overstates both what the majority circuit panel did and its implications. The Warden's

---

[2] This Brief in Opposition will refer to the Petitioner, Charles Ryan, as "the Warden" to avoid confusion, given Mr. Schad was the Petitioner in all previous proceedings.

position would effectively eliminate the federal court's ability to order a hearing *sua sponte* to address a procedural defense. This would be a significant departure from current law and this Court would be ill-advised to accept such an invitation.

Moreover, the Warden has materially overstated the scope of the remand order. As explained below, the panel did not require the district court hold a hearing on both Schad's diligence and the merits. It merely stated that if necessary, the district court could do so. This suggestion was made from a policy perspective as a means of conserving scare judicial resources and nothing more.

A. SCHAD WAS DILIGENT IN STATE POSTCONVICTION PROCEEDINGS

During the state postconviction proceedings, Schad alleged specific facts supporting his constitutional claim: trial counsel was ineffective when he failed to properly investigate Schad's background, but instead relied on a presentence report prepared by the court's employee, and a mental health expert whose only information came from that report, and two visits with Schad.[3] As a result of counsel's ineffectiveness, the sole sentencer, the trial judge, concluded that Schad's childhood was "unfortunate," but that fact was not a "persuasive mitigating circumstance," and sentenced Schad to death. ("The court does not consider the defendant's unfortunate childhood a persuasive mitigating circumstance in this case. ER 187.)

[3] The Arizona district court agreed that Schad's only expert, psychiatrist Otto Bendheim, at trial "alluded to" Schad's "'deprived'" childhood, but did not opine or even "indicate" that any mental health issues resulted from that experience. Pet.Cert., App. B-82. Bendheim, who knew little about Schad, visited Schad twice at the jail twice, reviewed the presentence report the court employee had written, testimony from Schad's prior conviction in Utah, and conducted some research on the circumstances surrounding the prior conviction. Bendheim testified Schad had "a miserable childhood," "was deprived" and "unloved." R.T. 8-22-85, pp. 48, 51. He also testified that as a child Schad was "sent from pillar to foster home to foster home." *Id.* In fact, Schad never lived in foster homes.

Postconviction counsel asserted counsel was ineffective at Schad's capital sentencing trial when counsel failed to conduct the "fundamental," independent "thorough investigation" of Schad's "background" and "social history" or "research or even address the most basic issues in any mitigation investigation." Postconviction counsel asserted as well that rather than conduct the key investigation the law required he conduct, trial counsel relied on a presentence report prepared by a state court employee: the trial court's parole officer. Counsel explained that report was "seriously incomplete," "materially inadequate," contained "significant material omissions," and "provided only limited documentation" of "Schad's history of abuse" and "the possible effects it had on his emotional well being and the part in played in the offense." ER 292-295, 323-329, 333-337, 343-345, 347, 349.

Postconviction counsel also presented evidence demonstrating trial counsel's failure to investigate and "explore" "Schad's life history as a mitigating circumstance" or "request a psychological evaluation to determine … [Schad's] impairments" and "address[] Schad's abusive childhood," and the possible effects it had on his emotional well being and the part in played in the offense." That evidence included Schad's father's "regular[]" beat[ings] of him "with a belt and later with fists," beginning when Schad "was four years old," that Schad endured to "protect[] his siblings from similar treatment," not being allowed to participate in school activities or form friendships with others, and witnessing his father's repeated abuse of his mother." ER 336.

Counsel alleged that "[p]sychological evaluations can provide a foundation for mitigation," and defense counsel's failure to "request a psychological evaluation to determine" Schad's impairments "is incomprehensible." ER 294, 346. The expert explained that to

"complete [the] social history," she needed a "thorough psychological evaluation" to uncover all "the abuse" Schad "suffered," and the resulting consequences to him. ER 337. Counsel explained that circumstances further delaying the completion of the mitigation investigation included the time intensive process of "[o]btaining out-of-state records," including prison and parole records from Utah, and the Arizona's prison refusal to grant a contact visit between counsel and Schad. ER 282-295; 301-302, 323-333-337.

Counsel also explained the harm created by the state court's belated appointment of the mitigation expert whose appointment counsel had long ago requested. As a direct result of that delay, postconviction counsel had only recently discovered that the "original" motion she filed requesting appointment of a mitigation expert had been "lost in the [court's] system" for several months. ER 344. Once counsel discovered these facts, she moved the county court for an "expedited ruling" on the expert's appointment. That motion was granted two weeks later, and the mitigation expert only then finally appointed. ER 300-302, 304, 329.

Following her belated appointment by the state court on July 16, 1995, the mitigation expert initiated investigation into Schad's background, detailing her efforts to locate needed records and key witnesses, and identifying the barriers she encountered in completing this key investigation many years later. ER 64, 69, 106-110, 333-337. The expert filed affidavits describing her efforts to investigate Schad's background, the need to interview family members (all of whom resided out of state), conduct necessary research and prepare a "complete social history." ER 323-327; 333-337. On October 19, 1995, postconviction counsel supplemented the state postconviction petition with additional affidavits, including an affidavit from the recently appointed mitigation investigator. That affidavit described the obstacles the mitigation

investigator encountered in completing the investigation, including both counsel and the expert's delayed appointments.[4] Counsel explained the need for "additional time" to uncover all the evidence supporting a life sentence, including Schad's social history records, all of which were located out of state, and involved "very time-consuming" efforts, and "a very lengthy process." *Id.* Schad's "complete military records" was "an equally time consuming process." *Id.* Counsel requested "discovery," that the state court order production of Schad's prison and military records, a psychological evaluation, and a "full evidentiary hearing." ER 301-02, 304, 328-329; 343-345, 347.

The expert's affidavit included additional evidence that trial counsel failed to investigate and present at Schad's capital sentencing: Schad "was never allowed to have a relationship with his mother or his siblings. Whenever his mother would show affection, as a mother to a child, Mr. Schad's father would yell at him and at Mrs. Schad. Both were the victims of the father's abuse. []Schad was treated more like an indentured servant than a child. From the time he was nine years old, he had to pay his own way around the house. He was not allowed to participate in after school activities or to have friends…. From the time he was four years old, Mr. Schad['s] father beat him regularly with a belt and later with fists." Schad's father was "always mad at" him. ER 335. "As a young boy and teenager," "Schad was forced to work along side his father," watch his father get "drunk after work," and required "to purchase alcoholic beverages" for his father. *Id.*

---

[4] Postconviction counsel was not appointed until January 31, 1994. ER 328.

The mitigation expert explained that the only psychological evaluation performed on Schad occurred in 1978,[5] and a "current" and comprehensive "evaluation" was needed. She also explained that Schad was fearful of discussing his family history, and addressed the barriers that increased his fear. She quoted Schad's statements to her that sitting "in that little cubbyhole, and trying to talk to you through that window, isn't the easiest thing for me to do, especially trying to take you into my past." Schad told her that he had "really never done it before.... let alone trust anyone with it," but he was "trying...." ER 336.

The expert's affidavit explained as well that:

> More interviews with Mr. Schad are essential. Obtaining the records as described above are crucial in properly preparing a Mitigation Report. A law library will not provide the documentation on Mr. Schad's life history. There is no ready reference from which to draw this information. Only life records provide the foundation for mitigation which is believed to exist in Mr. Schad's case.

Wake Affidavit, p. 5. (Oct. 18, 1995), ER 337.

These facts refute the Warden's contention that the panel opinion must be reversed because Schad "failed to show even minimal diligence" under *Williams v. Taylor*, 529 U.S. 420, 437 (2000), "when he did not file affidavits with the state court to support his [ineffective counsel] claim." Cert.Pet., p. 17. Schad filed affidavits detailing the investigation, its status, identified additional records that needed to be located and reviewed, and explained the time-consuming nature of discovering and collecting the needed historical and social history documents, and the obstacles encountered when the prison denied counsel's request for a contact visit with Schad. ER 333-337; 347. Schad alleged facts that entitled him to a hearing under Arizona law: sentencing counsel was ineffective when he failed to discover and present

[5]As previously stated, the psychological examination was cursory and inaccurate.

important mitigating evidence about Schad's background and social history and supported a life sentence. Cert.Pet.App. A-39; ER 292-295, 301-310, 322-327, 328-337; *State v. Watton*, 793 P.2d 80, (Ariz. 1990)(colorable claim shown where defendant's allegations, if true, might have changed the outcome."). And, Schad requested a hearing where that evidence could be further developed. Cert.Pet.App. A-39; *Williams*, *supra*. ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.").

The Warden responded to Schad's petition, and requested the postconviction judge deny Schad a hearing and relief for two reasons. First, the Warden contended that Schad did not identify what he "expects to find in what has to be voluminous records from two states and the military" that he sought. Schad's expectations in obtaining and reviewing Schad's biographical records were clear: to discover the key facts of Schad's background and social history: his childhood and adult experiences, including his experiences during his military service, and the background, history and experiences of his maternal and paternal parents and siblings, including Schad's father's WWII military service and experiences. Thus, just like the petitioner in *Williams*, Schad sought to "conduct an investigation that would have uncovered extensive records graphically describing [Schad's] nightmarish childhood," and Schad being "severely and repeatedly beaten by his father...." *Williams*, 529 U.S. at 395; *Sears v. Upton*, __ S.Ct __ 2010, 2010 WL 2571856, *3-5 (2010)(mitigating evidence of defendant's parents' "physically abusive relationship," cognition deficits resulting in problems with impulse control, traumatic experiences, "grandiose self-conception," and "evidence" of "magical thinking" "might well have" made a difference at sentencing); *Porter v. McCollum*, 130 S.Ct. 447, 449-451

(2009)("extensive mitigating evidence" unknown to "penalty-phase counsel" concerning the "described his abusive childhood," including his "father['s]" weekly violence, that defendant "was his father's favorite target, particularly when [he] tried to protect his mother," and impaired defendant's "ability to conform his conduct to the law and suffered from extreme mental or emotional disturbance." State court "unreasonably discounted evidence of … childhood abuse…."); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision…because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'"(internal citation omitted).

Second, Schad requested a hearing so he could present evidence demonstrating, as then Arizona law required,[5] and the Warden argued to the postconviction judge that Schad must prove: a direct link between his conduct at the time of the crime and his abusive childhood:

> With respect to Defendant's allegation of child abuse, it should be noted that before such evidence is considered mitigating, the burden is on the Defendant **to establish that it had a direct effect on his conduct** at the time that he murdered [the victim.]

ER 319 (emphasis added). To support that contention, the Warden cited seven Arizona state court cases holding exactly that: A defendant must demonstrate a causal connection between his mitigation and his conduct at the time of the crime "that was beyond his control" before his mitigation can be considered to support a sentence less than death.[7]

---

[5] *See Lambright v. Schriro*, 490 F. 3d 1103, 1114 (9th Cir. 2007); *Styers v. Schrio*, 547 F.3d 1025, 1035-1036 (9th Cir. 2008); *Williams v. Ryan*, __ F.3d. ___, 2010 WL 4188304 (9th Cir. Oct. 26, 2010).

[7] The Warden cited and described the following cases to support its request that the state court deny Schad a hearing and relief:

In late March, 1996, the state trial court issued an order stating it would consider whether to grant an evidentiary hearing on Schad's postconviction claims. The court stated:

> FURTHER ORDERED that the State shall have 30 days from the receipt of this order to file a supplemental response addressing the merits of the following claims:
> Claims: Preliminary Petition for Post-Conviction Relief Claims 8.8 and 8.18: Supplement Statement of Grounds for Relief Claim 3.
> FURTHER ORDERED Defendant shall then have 15 days to respond to the merits of the State's supplemental response.
> Thereafter, this Court will take the matter under advisement and determine whether an evidentiary hearing is necessary and on what grounds.

"*State v. Murray (Robert)*, ... 906 P.2d 542, 577 (1995)(Defendant presented evidence that he 'had problems with involuntary bowel movements while growing up' and that his father hit him with 'fists' while disciplining him; not mitigating because defendant did not prove it impacted his behavior in a way that was beyond his control.)' *State v. Murray (Roger)*, ...906 P.2d 542, 577 (Defendant presented evidence that his father hit him with fists, a belt, and a 'switch,' that defendant left home at 14 or 15, and was 'shunned' by his father after defendant's parents divorced; not mitigating because defendant failed to prove that his background 'impacted his behavior' in committing the murders). *State v. Walden*, 905 P.2d 974, 999 (1995)(Claims that father was a verbally abusive drunk convicted of public sexual indecency and sexual misconduct, that his sibling 'were often ill,' that his sister attempted suicide while in high school not relevant to mitigation because defendant failed to show that such 'had an effect or impact on his behavior that was beyond the defendant's control.' Defendant's 'claim' that his family background caused him to suffer 'low self-esteem and alcoholism' does not explain how it had anything to do with his commission of the rapes and murder). *State v. Stokely*, __ Ariz. __ 898 P.2d 454 (1995)(38-year-old defendant failed to prove that his 'chaotic and abusive childhood' 'had an effect or impact on his behavior that was beyond the defendant's control.' Not mitigating.); *State v. Bolton*__ Ariz. __, 896 P.2d 830 (1995)(Defendant's 'undisputed severe emotional and physical abuse as a child' *not* a mitigating circumstance because defendant (19 at time of murder) failed to prove that something in that background had an effect or impact on his behavior that was beyond his control. 'The remedy for child abuse is to submit to therapy, not to abuse others and then ask, in return, to be excused.'). *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994)(Unless the defendant can prove that a difficult childhood had an effect or impact on his behavior that was beyond his control, it is *not* relevant to mitigation. Defendant failed to prove that his difficult childhood rendered him unable to control his actions."). *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158 (1994)(Nothing in record substantiated defendant's claim that he was "reared in a dysfunctional family," except for his father's alcoholism and the family's period moves due to military transfers. Moreover, defendant failed to demonstrate *how* his alleged poor upbringing related to the murders.")(italics in original). ER239.

The state trial court did not act on Schad's request for a hearing until June 21, 1996. In its order denying Schad a hearing and all relief, the state court concluded, just as the Warden asked it to do, that Schad's request for needed funds to investigate and a hearing to present the results of that investigation "is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might effect sentencing. The claim has not (sic) merit." App. D-4.[8] Schad moved for rehearing, stating:

> Rather than hold an evidentiary hearing on these claims at which this Court could hear and evaluate Defendant's claims, this Court has summarily dismissed the petition. It did so based upon assumptions which a full and fair hearing would contradict.
> Based upon these materials facts, which neither the State nor this Court in its summary order, have controverted, this Court should reconsider its conclusion that certain claims raised by Defendant are precluded, and that mitigation evidence and impeachment evidence recently found, which was never previously investigated, is immaterial. At the very least, it should or an evidentiary hearing regarding the newly discovered evidence.

Mot.Rehrg. pp. 1-2. Postconviction counsel explained as well:

> [Ariz.R.Crim.P.] Rule 32.6(c) permits summary disposition only if no purpose would be served by further proceedings. Such conclusion cannot be reached here while counsel continues to uncover and investigate matters which prior counsel failed to uncover.
> ...
> Counsel also stated:
>
> The Court must exercise that responsibility by providing facts that enable the Appellate Court to determine why the post-conviction Court found the facts to be as they are.

---

[8] Postconviction counsel had earlier responded to the "prosecutor's" reference to the social history investigation counsel requested "as a 'fishing expedition," stating: "Investigating the social history of any capital case defendant is fundamental to mitigation. Researching Mr. Schad's history of childhood abuse is no fishing expedition. The abuse has already been documented to a limited extent." Counsel explained that "[f]urther investigation would define and place Mr. Schad within the family environment which allowed and condoned such abuse to occur and how it impacted his involvement in this office," and that the trial court's "presentence report provided only limited documentation of" "Schad's life history" and was "incomplete." ER 293-294.

> For all the above-stated reasons, it is hereby respectfully requested that this Motion for Rehearing be granted and than evidentiary hearing be conducted on the issues raised in the Defendant's Petition.

Mot.Rehrg. pp. 3-4.

Postconviction counsel filed yet another affidavit supporting a hearing on his constitutional claims. The trial court denied that motion as well. App.A-39. The Arizona Supreme Court denied Schad's petition for review of the denial of postconviction relief without comment or explanation. ER 412.

These facts support the limited remand the Court ordered below. They also disprove the Warden's contention that the state court "dismissed" Schad's ineffective counsel claim "without an evidentiary hearing" because Schad failed to file "affidavits with facts supporting the claim." Cert.Pet.App. p. 14. Schad filed affidavits detailing the information supporting relief, and supporting his request for additional time to complete the investigation that included locating and contacting Schad's relatives, and others, all who lived across the country in New York. ER 143-147. He also identified other time-consuming barriers he had encountered in conducting the investigation: the prison's refusal to permit a contact visit with Schad, and prison regulations requiring counsel obtain a court order to obtain Schad's prison, including medical, psychological and parole records in Arizona, Utah, and Wyoming. ER 334; 333-337.

The state court denied counsel's requests for contact visits with her client and disclosure of Schad's prison records. But it never addressed, much less explained, the additional mitigating evidence postconviction counsel presented: the abuse Schad suffered and witnessed as a child, and his father's explosive, terrorizing acts of violence.

The Warden's contention that Schad was not diligent because counsel filed "numerous motions for extensions of time and status conferences" fails as well. Cert.Pet., p. 14. The Warden concedes post-conviction counsel faced "various obstacles...." Cert.Pet., p. 24. The postconviction proceedings were chaotic, but that chaos was neither Schad's creation nor fault. As The Warden and the dissenting circuit appellate judge concede, over a three year period, the state postconviction judge appointed seriatim a series of counsel to represent Schad, and then granted each of those counsel's motions to withdraw. Cert.Pet., p. 23. The dissenting circuit appellate judge concedes that the first counsel the trial court appointed sought five requests for additional time before he withdrew from representation, and the second counsel the trial court appointed filed twelve motions requesting additional time before he withdrew. *Id.* The State never objected to these motions to withdraw. The trial judge appointed Schad's final postconviction counsel, Rhonda Repp, in February, 1994 Repp moved the trial judge that same month to provide Schad funds to investigate, and in March, 1994, Repp requested the judge appoint a mitigation expert. As discussed above, unknown to Repp, her last motion for needed funds was misplaced in the state court system. ER 344. That state court error delayed the expert's appointment for more than a year, until July 6, 1995. That delay, too, was not Schad's fault. Also, in appointing multiple counsel to represent Schad in his key postconviction proceedings, and then granting each counsel's motion to withdraw, the trial judge neither stated nor implied, much less found as a fact, that the counsel the judge had appointed were less than diligent in Schad's representation in those proceedings. Each order allowing counsel to withdraw was for good cause shown. The Warden has not provided any reason to believe otherwise.

Shortly after Repp's request, the trial judge reviewed Schad's "preliminary petition" and "Supplemental Petition, the State's Response and the Defendant's Reply," and made "findings with respect to" that petition. ER 146. As to some claims, the judge denied relief and "dismiss[ed]" the claims, but as to others, including Schad's claim that his sentencing counsel was ineffective, the judge ordered that claim "survive[d]" "preclusion and dismissal," provided The Warden "30 days" to file a "supplemental response addressing the merits" of that claim, and provided Schad "15 days to respond to the" State's pleading. ER 147. The judge stated he would "thereafter" "take this matter under advisement and determine whether an evidentiary hearing is necessary and on what grounds." ER 147. As discussed above, unknown to Repp, her last motion for needed funds to investigate was "misplaced" in the state court system. ER 344. That state court error delayed the expert's appointment until July 6, 1995. That delay, too, was not Schad's fault. Also, in appointing multiple counsel to represent Schad in his key postconviction proceedings, and then granting each counsel's motion to withdraw, the trial judge neither stated nor implied, much less found as a fact, that appointed counsel was less than diligent in Schad's representation in those proceedings. Each order allowing withdrawal of counsel was for good cause shown. The Warden has not provided any reason to conclude otherwise.

The Warden's contention that a hearing on diligence is not needed because the record is "very clear" on "what counsel did and did not do" to diligently investigate Schad's background is disingenuous. Pet.Cert., p. 24. The record in the light most favorable to Schad demonstrates diligence. That there is a dispute about the material facts means only that a hearing is needed. "[O]n a motion for summary judgment, the evidence presented by the non-moving party is to be

taken as true and all reasonable inferences that may be drawn therefrom are to be drawn in the non-moving party's favor." *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 660 (6th Cir. 1999). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must evaluate each motion on its own merit and draw inferences *against* the party whose motion is being considered.

Here, the Court of Appeals merely recognized that there is a factual dispute about diligence that cannot be resolved without a hearing. On the record as it stands, Schad has established diligence.

As discussed above, postconviction counsel filed a motion requesting funds and additional time to investigate and obtain all the available evidence supporting a life sentence. Postconviction counsel's efforts to conduct that needed investigation were thwarted first when the funds motion was lost in the state court system, and then again when the trial judge later denied that motion and a hearing where Schad could present evidence to prove his diligence and entitlement to relief. ER 143-145.

But the record is clear on the reason The Warden opposed Schad's request in the district court for a hearing on sentencing counsel's ineffectiveness. Although The Warden discussed some of the barriers Schad's counsel faced in investigating Schad's background[9] its opposition to

---

[9]Postconviction counsel requested time and money to complete their needed investigation of Schad's background, but, except for some funds for the mitigation expert, the judge denied those requests. The work the mitigation specialist needed to conduct required obtaining social history records and interviewing important witnesses. Schad's mother's initial reluctance and fear of talking on the phone with an unknown investigator who said she was assisting her son is

a hearing was not based on Schad's lack of diligence, but on an entirely separate argument: the postconviction court must deny Schad's ineffective counsel claim because Schad "alleged no causal nexus between Schad's childhood and his ability to control his actions when ... he murdered [the victim." Rsp.Brf.Merits, p. 64 (Az.D.Ct. Mar. 9, 2001). The Warden argued Schad "cannot demonstrate prejudice" where "[n]othing in the material [Schad presented] establishes a causal nexus between childhood and" the "murder" "years after he left home." *Id.* To support its argument, The Warden wrote:

> The Supreme Court has said that the sentencer must consider relevant mitigation, but it has never held that an abused childhood *per se*, with no causal connection to the offense, is relevant, much less sufficient to reduce the penalty. The Arizona Supreme Court has held that family background is not relevant unless the defendant establishes that it had a definite causal link to his behavior when he killed. [*State v.*] *Djerf*, 959 P.2d at ¶ 61.

Id. The record is equally clear that the district court below denied Schad's request for a hearing for the very same reason: Schad did not demonstrate a direct causal nexus between his mitigation and his actions at the time of the crime:

> Petitioner's age and life experience attenuates any causal connection between Petitioner's dysfunctional childhood and the 1978 murder. See *State v. Djerf*, 191 Ariz. 583, 598, 959 P.2d 1274, 1289 (1998)("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior....").

App. B-99. That law, of course, is contrary to this Court's longstanding clearly established federal law. In *Tennard v. Dretke*, 542 U.S. 274, 289 (2004), this Court held unconstitutional the

---

neither surprising nor unreasonable given that this was the first contact from anyone assisting her son in nearly fifteen years. These facts only underscore the prejudice Schad suffered when his trial counsel failed to adequately investigate Schad's background, family and evidence supporting a life sentence, and when postconviction counsel was denied the resources needed to undertake a thorough social history investigation. *Sears, supra*; *Porter v. McCollum, supra*; *Wiggins supra*.

Fifth Circuit's rule that evidence can only be relevant to mitigation if the defendant proves a causal nexus between the mitigation and the crime.. The Court explained that a scheme that requires a petitioner first establish a nexus or causal connection between his mitigating evidence supporting life and his actions at the time of the capital crime before such evidence is given full consideration and effect has "no foundation in the decisions of this Court." *Id.* Arizona's rule was identical to Fifth Circuit's rule. *Lambright, supra; Styers, supra; Williams v. Ryan, supra.*

The Court of Appeals has given the Warden the opportunity to disprove the facts as pled by petitioner, which they have failed to do, and has instructed the district court to utilize the proper standard in reviewing the facts. There is nothing extraordinary or outrageous in this reasonable approach. The Warden also faults Schad for allegedly not requesting the district court to hold a hearing on his diligence in the state court proceedings or requesting "further factual development" of the state court record to establish diligence. Cert.Pet., p. 14. The Warden misrepresents the record and for this reason alone certiorari should be denied. Schad repeatedly requested a hearing in the district court. In his preliminary habeas petition filed in the district court below, Schad requested that court **"[c]onduct an evidentiary hearing at which proof may be offered concerning the allegations of this petition**, [and] [g]rant petitioner, who is indigent, appointment of counsel and sufficient funds to secure expert testimony and evidence necessary to prove facts as alleged in this petition," [and] [g]rant petitioner leave to amend this petition after sufficient time to complete review of the record and investigation[]." ER 386 (emphasis added). Schad later filed an amended habeas petition where he requested the District Court:

> **Conduct an evidentiary hearing to resolve any factual disputes raised by the Respondents' Answer to this Petition, or by Petitioner's Response to any**

> **Affirmative Defenses raised by the Respondents…[and] Grant such further and additional relief as may be just.**

ER 222-223 (emphasis added). In its "Answer Re: Procedural Status of Claims" dated September 22, 1998, to Schad's habeas petition, The Warden stated:

> P. Petitioner's Claim of Ineffective Assistance of Counsel has been exhausted with Respect to Subclaims 1, 2 and 3….

Id., p. 25. The Warden identified "Petitioner's claim":

> Petitioner contends that he was denied effective assistance of counsel at sentencing because:
> 1. Counsel failed to investigate Petitioner's background and develop available mitigating evidence.
> 2. Counsel failed to locate records and interview persons familiar with Petitioner's background.
> 3. Counsel failed to object to or correct the inaccurate information in the presentence report.
>
> ….
>
> Petitioner has exhausted available state remedies with respect to Subclaim 1. [], having fairly presented them to the state's highest court for review.

Id., p. 26.

That was not all Schad did to try to obtain a hearing on his ineffective counsel claim and Respondent's defenses. In his Reply to The Warden's Response to Schad's "Motion to Require Respondents To Admit or Deny Factual Allegations in Amended Petition," Schad stated:

> Respondents' position that this Court can resolve the procedural issues of exhaustion, default, cause and prejudice, and fundamental miscarriage of justice without an understanding of the facts is untenable. This Court must be informed of which facts are agreed upon and which facts are in dispute. If respondents deny the material facts averred by petitioner, **then, an evidentiary hearing is required to resolve those facts so that this Court can make an informed decision on the procedural posture and the merits of petitioner's claims**.

Id., pp. 2-3 (Ariz.D.Ct. Dec. 21, 1998)(emphasis added).

He also repeatedly argued in those proceedings that he had exercised diligence in attempting to discover all the evidence supporting a sentence less than death, and he requested the district court hold a hearing where that evidence could be presented.

The district court denied Schad a hearing, and all relief, but granted a certificate of appealability on sentencing counsel's ineffectiveness. ER 8. Necessarily included in that certificate of appealability are all procedural issues "fairly subsumed" in the certified issues. *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005)(where issue "subsumed within the COA [it is] properly before this court for consideration."), *aff'd on other grounds*, 127 S.Ct. 1070 (2007). Schad's diligence in those proceedings is fairly subsumed in that certified question.

B. A BRIEF REMAND IS APPROPRIATE HERE.

Despite the Warden's sounding of the alarm, the decision below granting a short remand to the district court to receive additional evidence on Schad's diligence does not conflict with either *Williams*, *supra*, or *Schriro*, *supra*, Pet.Cert., p. 14, on the definition of diligence, or the availability of evidentiary hearings where needed. Schad made reasonable attempts to investigate trial counsel's ineffectiveness at his capital sentencing trial. He requested resources and time, and he requested the court "[c]onduct an evidentiary hearing to resolve any factual disputes raised by Respondents' Answer to the Petition, or by Petitioner's Response to an Affirmative Defenses raised by the Respondents." Amd.HCP, ER 222-223.

The Warden contends that review of the state record alone is sufficient to determine Schad's diligence. Cert.Pet. p. 22. The record alone shows Schad's diligence. The court should

deny certiorari for this reason as well.[10] Schad repeatedly requested funds to investigate and discover all the evidence supporting relief, and a hearing where that evidence could be presented. As explained above, these proceedings were unusual in that the state court judge first appointed, and then granted motions to withdraw from a series of counsel who appeared to have done little, if anything, in their representation of Schad in the posconviction proceedings. In granting those counsel's motions to withdraw, the state court judge made no findings of any kind indicating, much less finding, that any of the counsel he had appointed were or had been negligent or failed to exercise diligence in their representation of Schad in those proceedings. But the record is clear that counsel alleged a colorable claim, supported those allegations with affidavits from a mitigation specialist, and requested a hearing to present additional evidence to prove Schad's entitlement to relief.

The Warden's reliance on the dissent's description of the state postconviction proceedings does not alter that fact. Pet.Cert., pp. 23-24. The described events provide no facts other than the dates the trial judge appointed each counsel, the number of extensions each counsel sought, whether any requests for funds were made, and the date the trial judge granted each counsel's motion to withdraw. *Id.*[11] Similarly, The Warden's contention that the state court denied Schad an evidentiary hearing based on

---

[10] The court should deny certirorari where alternative grounds exist to support the judgment of the lower court. "[A]a respondent may argue to this Court any basis supported by the record for affirming the judgment." *Thigpen v. Roberts*, 468 U.S. 27, 33 (U.S. 1984)(Rehnquist, C.J., dissenting on different grounds.) Because the facts in the record do demonstrate diligence, Schad has already established his right to an evidentiary hearing because he did not "fail to develop." *Williams, supra.* If anything, the Warden has received the windfall with the Court of Appeals giving him a second bite at the apple to offer facts which would show that Schad was not diligent in state court.

[11] The Warden has never alleged or offered any facts to suggest that the Motions to Withdraw were not for good cause.

"counsel's failure to file any affidavits supporting his claim" is erroneous as well. *Id*, p. 25. As detailed above, Schad filed affidavits describing the mitigating evidence counsel was able to uncover without a hearing or additional funds to conduct the thorough investigation needed. Those facts established a colorable claim under Arizona law. Also discussed above, the state court only denied Schad a hearing after The Warden requested it do so for an unconstitutional reason: Schad did not establish a causal connection between his life-supporting evidence and his actions at the time of the crime.

Those facts also answer the dissenting judge's concern that the majority failed to consider Schad's diligence in the state court proceedings before addressing the new evidence Schad discovered once counsel were provided funds to investigate. *Id.*, p. 26. As discussed above, Schad exercised diligence in the state court: he alleged a colorable claim, supported that claim with available affidavits and requested a hearing.

The Warden's contention that the court below "awarded Schad a second chance to show his diligence" is misguided. Cert.Pet., p. 27. First, as shown above, Schad was diligent in the state court proceedings, as the facts presented here make clear. But if this Court questions that fact, the remand by the majority court below is the proper remedy. Schad has never been provided a hearing in either the state or federal courts to present evidence establishing his diligent attempts to discover all the facts supporting a life sentence, or evidence supporting a life sentence. He is entitled to both on these facts.

Finally, the Warden complains loudly and repeatedly that the court of appeals has ordered the district court to hold a hearing on the merits of the claim. The Warden completely misstates the record. The court of appeals merely suggested that the district court may chose to take

evidence on the merits of Schad's ineffectiveness claim at the same time that it hears evidence on the question of diligence. This makes sense from a policy standpoint and a judicial economy standpoint. The district court is certainly capable of taking evidence and then later ruling that it will not consider that evidence should it determine that Schad was not diligent in discovering the facts. The suggestion of a simultaneous hearing was merely that – a suggestion. The court of appeals certainly did not order the district court to do so and that is a matter to be worked out between the parties and the court on remand. It is certainly not worthy of this Court's exercise of certiorari jurisdiction.

C. NOTHING IN THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DECISION IN *LANDRIGAN V. SCHRIRO*. RATHER THE COURT OF APPEALS DECISION FAITHFULLY APPLIED THIS COURT'S CLEARLY ESTABLISHED FEDERAL LAW.

The opinion below does not conflict with *Landrigan*, as The Warden now contends. Cert.Pet., pp. 27-33. The district court's alternative ruling that Schad was not prejudiced by his counsel's failure to present mitigation evidence was tethered to its erroneous view[12] that Schad need establish a causal connection between the mitigation and the crime before it could be relevant to punishment. A-99. Thus, the district court clearly erred. *Landrigan* is not implicated – at all.

As discussed above, Schad presented a colorable claim in the state court—a low threshold under Arizona law. Schad met that showing when he alleged facts, that if true, entitled him to relief. *State v. Watton, supra*, (colorable claim shown where defendant's allegations, if true, ***might*** have changed the outcome.")(emphasis added). Schad also requested a hearing to

[12] It was the Warden who urged the district court to adopt this legally erroneous holding. ER 239.

further develop the evidence as state law required. But he was denied that opportunity when the state court denied his petition, request for a hearing and all relief.

Also as noted above, it was the Warden who requested the postconviction judge deny all relief, not because Schad failed to exercise diligence in the court below, but because, as it argued to the state court, Schad had not demonstrated a "direct causal connection" between his actions at the time of the crime and his mitigation evidence. ER 319 In denying Schad relief on his ineffective sentencing counsel claim, the district court below applied the same unconstitutional nexus requirement that The Warden urged. App. B-99.

> While serving his sentence for the 1968 murder he had established a record as a model prisoner and gained the trust of prison officials who recommended parole on the grounds that Petitioner had addressed his psychological issues and did not represent a threat to society. (RT 8/22/85 at 59-67.) Petitioner's age and life experience attenuates any causal connection between Petitioner's dysfunctional childhood and the 1978 murder. *See State v. Djerf*, 191 Ariz. 583,598,959 P.2d 1274, 1289 (1998) ("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior"); *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (lack of a "nexus" between the mitigating factor and the crime "may be considered in assessing the quality and strength of the mitigation evidence"). For these reasons, Petitioner was not prejudiced by counsel's failure to present additional information describing the nature of Petitioner's traumatic childhood.

App. B-99.

The dissenting judge also concluded a hearing was not needed based on the district court's "alternative" ruling that "even considering the newly developed information" supporting sentencing counsel's ineffectiveness, Schad was not entitled to relief. But the dissent failed to recognize that the alternative ruling was tethered to an unconstitutional premise.Review of the facts plainly establishes that Schad was prejudiced by his counsel's unprofessional errors. Once

Schad was appointed a Federal Public Defender and funds for records, investigation and experts were finally provided to him, a plethora of classic mitigation was uncovered.

Once Schad entered the federal district court, counsel were appointed and repeatedly requested the hearing Schad had been denied in the state court. Counsel also undertook the thorough investigation of Schad's background that the law has long required[13]As shown above, the fruits of that investigation uncovered additional key evidence supporting Schad's claim alleging sentencing counsel's ineffectiveness. Schad presented that evidence and moved the district court for an evidentiary hearing.

The new evidence radically altered the picture of Schad's family background presented in the state court presentence officer's report to the sentencing judge, and Dr. Bendheim's brief (and even erroneous) testimony. The new evidence showed not only that Schad was seriously physically abused, neglected, and ultimately, abandoned, by his parents, but it detailed the longstanding mental illness, psychosis, clinical depression and chemical addiction his parents suffered throughout Schad's life. Experts armed with the facts discovered once federal habeas counsel were appointed and obtained the funds needed to conduct the thorough investigation required explained both the "profound effect" that Schad's severely mentally ill parents had on him, but also Schad's "increased" "susceptibility for [the] developmental, psychological and debilitating mental disorders" that he suffered. ER 462-463.

---

[13] The district court appointed the federal public defender's office to represent Schad. The Arizona FPD had recently started a capital habeas unit. The capital habeas unit had staff investigators and paralegals and a budget for experts – resources that the state has successfully kept from Schad in the state courts. Undersigned counsel were both employed by the FPD in Arizona at the time of appointment.

These facts show that Schad's father was a WWII war hero, but his 18-month incarceration at Stalag 17-B, the infamous POW camp in Austria, left him extraordinarily impaired and mentally ill. He was a diagnosed schizophrenic who suffered brain damage, post-traumatic stress disorder, alcoholism and psychosis. ER ER 467, 484-491, 552-563. He was "violent and unpredictable," "paranoid" and "irrational," "creating a chaotic and frightening home environment in which his illness took center stage." ER 559-560, 562. He beat his wife, Mabel, in the face and head, leaving her with "a fat lip and black eyes." ER 580-581. He was "totally irrational," turned over the dinner "table filled with food and dishes," threatened Mabel with a butcher knife," and was intermittently incarcerated in the psychiatric ward at the VA hospital. ER 780.

Mabel's attempt to escape from her violent husband and home was through prescription drugs and work-filled days. For nearly thirty years, she sought medical attention for an ailment nearly every month. She was regularly prescribed narcotics, including Darvon, Percodan, Emagrin, and Codeine, often in combination for various injuries she suffered. She was prescribed Phenobarbital for her nerves. ER 590-593. Her "significant psychological problems" and "clinically significant" "emotional and psychological detachment" left her "profound[ly] detach[ed]" from Schad and "so disengaged from" Schad and his siblings that her behavior met the clinical criteria for "severe child maltreatment." ER 474, 477. Her detachment resulted in one of Schad's siblings dying when she was less than a month old because Schad's mother did not notice that her child was ill. ER 474.

Schad's younger brother, Tom, was a Viet Nam veteran and an alcoholic at 21 years old. ER 509-513, 1074-1152. Tom suffered post-traumatic stress disorder, depression, and was anxious, suicidal and had homicidal ideation. ER 1089-1101. He felt betrayed and abandoned by his mother. Tom described his father as a "distant, angry, reclusive" alcoholic. Tom was "ready to explode" and felt desperate about her circumstances. *Id.*

The severe mental illness Schad's family members suffered had a profound effect on Schad. Mabel explained that her husband "was really hard on Ed . . and never wanted [her] to show Ed any affection." She didn't "really know why it enraged him so, but [she] was afraid to hug Ed because [she] knew that Edward might hit me if I did." ER 582. Unsurprisingly, the effects of Mabel's detachment and mental illness, and Ed Sr.'s mental illness, alcoholism, random and unpredictable violent and often, delusional behavior were profound. Schad was alienated from both his parents, and unloved. Schad attempted to protect his mother and his siblings from their father's explosives rages. But his father's mental illnesses and explosive rages left Schad beaten and battered. Schad's only escape was the military, and he joined immediately after his high school graduation.

Schad also suffered multiple cognitive impairments throughout his life. He was paranoid, anxious, manic, traumatized, suffered "severe and chronic mental illness," "bipolar affective disorder," and demonstrated "classic signs of chronic depression." ER 548. His coping mechanism again his life-long depression was a "manic state," an

"overly optimistic" state where "hopelessness and helplessness" "overwhelmed him" "by disorganizing his thoughts...." FR 548.

Had Schad's trial counsel conducted the proper and competent investigation into Schad's background, he would have discovered military, medical, psychiatric records and social history records and evidence from numerous sources that provided the true portrait of Schad's childhood, family background and the mental illness that pervaded Schad's life and actions. Classic mitigation. *Sears, supra*; *Porter v. McCollum, supra*; *Wiggins supra*.

After presenting the district court below with substantial evidence demonstrating the prejudice Schad suffered when his trial counsel failed to conduct a competent and thorough social history investigation the law required, Schad requested a hearing to present that evidence showing the consequences of his severely dysfunctional family and the physical and emotional abuse, neglect and abandonment he suffered from his mentally ill, chronically depressed, addicted and often psychotic parents. See *Michael Williams*, 529 U.S. at 437 ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law."). As explained above, and the majority properly found, Schad is entitled to that hearing: he exercised diligence in the state court by alleging facts, that if true, entitled him to relief, and he requested a hearing where he could present the facts supporting relief.

The Warden and the dissenting judge also rely on the district court's alternative ruling that the additional evidence Schad presented to that court did not support the need for a hearing. Cert.Pet., p. 28. The facts easily demonstrate that reliance misplaced. As detailed above, the

facts discovered from a thorough background investigation of Schad's life reveal a completely different picture and background than the bare one presented by the court's probation officer in the presentence report, and Bendheim's brief testimony. See *Sears, supra*; *Porter v. McCollum, supra*; *Wiggins supra*.

Had sentencing counsel conducted the investigation he was obligated to conduct, he also would have discovered substantial available mitigating evidence corroborating Schad's few statements to Bendheim about his childhood, and shown the severe and chronic mental illness Schad suffered, his history of abuse, neglect and abandonment by his parents, and the paranoia, anxiety, trauma and chronic depression that he developed and suffered throughout his life. But because sentencing counsel failed to properly investigate and discover the true facts and details of Schad's background, the sentencer, the trial judge, rejected the little evidence trial counsel did present as "unpersuasive." No tactical or strategic reason for sentencing counsel's failures exists, and the district court did not cite or rely on one. In fact, sentencing counsel feebly attempted to present psychological testimony and evidence of Mr. Schad's upbringing. So there is no reason to believe that he would not have presented this evidence if it had been discovered. However, because he failed to conduct the thorough investigation that he was required to, he failed to discover the evidence and thus the sentence was left with a false picture of who Schad was and is. *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009)(noting that the decisionmaker at "Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurate gauge his moral culpability.... It is unreasonable to discount to irrelevance the evidence

of Porter's abusive childhood, especially when that kind of history may have a particular salience for a jury evaluating Porter's behavior in his relationship with [the victim]."). *See also Sears v. Upton*, __U.S. __, 2010 WL 2571856 (2010)("We certainly have never held that counsel's efforts to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.")

These facts also answer the Warden's contention that the majority opinion failed to analyze whether the district court abused its discretion in denying Schad a hearing. Cert.Pet., p. 31. In fact, it did. The majority concluded, and the facts demonstrate, Schad alleged a colorable claim of sentencing counsel's ineffectiveness. App.A-39 (Schad alleged "sentencing counsel was ineffective for failing to discover and present mitigating evidence regarding Schad's family background."). The majority cited the expert affidavit attached that described the abuse Schad suffered as a child, including being beaten "with a belts or fists, refusing to allow Schad's mother to show him any affection, and isolating Schad from other children." *Id.* The majority noted the "expert's recommend[ation] that a comprehensive psychological evaluation be performed," and the need to "compile a thorough profile only through further interviews with Schad and his relatives." *Id.*

The majority also concluded, as the facts demonstrate as well, that in determining Schad's diligence, the district court erred in "focusing not on the reasonableness of Schad's efforts," but on his success in discovering all the evidence

supporting life. App A-43. After reviewing the evidence Schad discovered during the federal district court proceedings, the majority concluded that had that evidence:

> been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case.

App. A-44. The new evidence "showed how Schad's childhood abuse affected his mental condition as an adult," and "was so much more powerful than the cursory discussion of Schad's childhood contained in Bendheim's testimony and presentence report," and "might well have influenced [the sentencer] to impose a more lenient sentence." *Id.* This evidence provided the key connection between the evidence presented at sentencing of Schad's "intelligence, good character, many stable friendships, and church involvement," and Grove's death:

> Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery…

App. A-45.

The Warden's next contention—that the court below failed to evaluate the merits of Schad's ineffective sentencing counsel claim under *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), *Wong v. Belmontes*, 130 S.Ct. 383 (2009), or *Porter v. McCollum*, 130 S.Ct. 447 (2009), is misplaced. Cert.Pet., p. 32. The court below properly delayed that merits review following the district court's decision on Schad's diligence. Because there has been no evidentiary hearing, the court was not in a position to rule on the merits of the claim. The court did observe that the evidence as pled appeared to establish prejudice, but left it to the district court to find the facts. A perfectly reasonable ruling. The court did not "lecture[]" the district court; it merely provided recent decisions from

this Court that properly must be considered in deciding the merits of Schad's constitutional claim.

That request was understandable. As The Warden concedes, additional evidence counsel discovered in the district court proceedings was "stronger" than that presented at Schad's capital sentencing proceedings. *Id.* And as discussed above, the district court's opinion denying Schad a hearing on that evidence because it would not have made a difference must be rejected for a separate reason. Cert.Pet., p. 32. The district court first found that "the new materials [Schad presented], particularly Dr. Sanislow, offer a more elaborate explanation for the psychological effect of Schad's childhood experiences." ER 66.

But the district court then committed the exact same constitutional error as the state courts: it concluded Schad suffered no prejudice from trial counsel's ineffectiveness because Schad's "age and life experience" "*attenuate[d] any causal connection* between his dysfunctional childhood and the 1978 murder." ER 75 (emphasis added). That erroneous application of a causal connection requirement to defeat Schad's prejudice has no place here, and is contrary to this Court's clearly established law holding just the opposite. *Tennard, supra.* And, that is why the district court erred in rejecting Schad's evidence demonstrating the prejudice he suffered from sentencing counsel's ineffectiveness, and denied Schad's constitutional claim, and a hearing. Cert.Pet., pp. 31-33.

These facts also answer the Warden's next argument: that Schad has not identified the additional evidence he would present to "alter the district court's analysis of the merits." *Id.*,

p.33. When the district court alternatively ruled that Schad's three volumes of mitigating evidence was not prejudicial, it not only erred by failing to use the proper standard for diligence as described in *Williams*, but it also used the wrong standard. The District Court ruled that Schad's evidence would not have been considered by the sentencing judge because Arizona law required that the capital defendant prove a causal nexus between the mitigation and the crime. App. B-98-99. As discussed above, in denying Schad relief, the district court concluded:

> Petitioner's age and life experience attenuates any cause connection between Petitioner's dysfunctional childhood and the 1978 murder.... For these reasons, Petitioner was not prejudiced by counsel's failure to present additional information describing the nature of Petitioner's traumatic childhood.

Id., p. 99. This Court has long held application of a nexus test unconstitutional consistent with its decisions in *Tennard v. Dretke*, *supra*; *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). So, too, has the court below. *Lambright v. Schriro*, 490 F. 3d 1103, 1114 (9th Cir. 2007); *Styers v. Schrio*, 547 F.3d 1025, 1035-1036 (9th Cir. 2008); *Williams v. Ryan*, __ F.3d. ___, 2010 WL 4188304 (9th Cir. Oct. 26, 2010). But that is just what the district court applied here to deny Schad both a hearing and relief on his ineffective sentencing counsel claim.

The Warden's request that this Court grant review before allowing the district court to address Schad's evidence after applying the right standard for determining diligence because otherwise it would "sanction" "unwarranted delay," is without support. Cert.Pet., p. 35. Schad has not unnecessarily delayed these proceedings, as The Warden implicitly agrees. He has properly appealed his denial of relief. The majority opinion's brief remand of the proceedings below is well supported.

It is based on the common sense principle that a court may need to hear evidence to determine whether a petitioner failed to develop facts in the state court.

The Warden's reliance on other circuit decisions (where this Court later denied the Warden's petition for certiorari) to support an "'unspoken rule,'" Cert.Pet., p. 36, is not relevant here. The Warden's veiled and unseemly argument is to appeal to a perceived lack of respect of the Ninth Circuit Court of Appeals by this Court. The Warden appears to suggest that with a "wink and a nod" it can simply say "Ninth Circuit" and this Court will have a pavlovian response and simply reverse. This Court should not indulge such disrespect for its brethren on the Ninth Circuit. The question here is not what other panels have concluded or ruled in other, unrelated appeals. None of those cases warranted this Court's certiorari review either. The only relevant question here is whether the facts presented here support the action taken by the majority below in briefly remanding the proceedings to the district court to consider additional evidence. As we have shown, they do.

Respondent respectfully requests this Court deny the petition for writ of certiorari to allow the limited remand to the court below. That remand is supported both by the facts here, and the law, and does not conflict with any decision of the Court.

CONCLUSION

Nothing about the Court of Appeals decision is unique or surprising. The AEDPA did not deny the authority of Article III courts to hear facts on procedural defenses in habeas cases where there is a dispute.

The district court applied the wrong standard in determining diligence and tethered its

alternative holding on the merits to an unconstitutional premise. The court of appeals corrected those errors and sent the case back with proper instructions. Certiorari should be denied.

Respectfully submitted,

*DENISE I. YOUNG
Attorney at Law
2930 North Santa Rosa Place
Tucson, Arizona 85712
TELEPHONE: (520) 322-5344

KELLEY J. HENRY
Supervisory AFPD –Capital Habeas Unit
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37215
TELEPHONE: (615) 736-5047

*Counsel of Record

BY_____
COUNSEL FOR EDWARD SCHAD